



POLICE DEPARTMENT CITY OF NEW YORK

January 31, 2017

MEMORANDUM FOR: Police Commissioner

Re: Detective Sekou Bourne
Tax Registry No. 924971
Viper 14
Disciplinary Case No. 2015-14379

Charges and Specifications:

1. Said Detective Sekou Bourne while on duty and while assigned to Narcotics Borough Brooklyn North, on June 4, 2014, at around 1545 hours, at 480 Waverly Avenue, Kings County, did use physical force against Marcel Hamer without having police necessity to do so, to wit: Said Detective Bourne struck Mr. Hamer in the face.
P.G. 203-11 – USE OF FORCE
2. Said Detective Sekou Bourne while on duty and while assigned to Narcotics Borough Brooklyn North, on June 4, 2014, at around 1545 hours, at 480 Waverly Avenue, Kings County, spoke discourteously to Marcel Hamer, to wit: Said Detective Bourne told Mr. Hamer to, "Turn the fuck around."
P.G. 203-09 – PUBLIC CONTACT – GENERAL
3. Said Detective Sekou Bourne while on duty and while assigned to Narcotics Borough Brooklyn North, on June 4, 2014, at around 1545 hours, at 480 Waverly Avenue, Kings County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that he threatened an unknown individual with the use of force, without justification, to wit: While Said Detective Bourne was attempting to handcuff Marcel Hamer, Detective Bourne said to the individual, "You want to get fucked up."
P.G. 203-10 – PUBLIC CONTACT – PROHIBITED CONDUCT

Appearances:

For the Department: Nancy Lichtenstein, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For Respondent: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, New York 10279

Hearing Dates:

September 13 and November 1, 2016

Decision:

Respondent is found Guilty of Specification No. 1

Respondent is found Not Guilty of Specification Nos. 2 & 3

Trial Commissioner:

ADCT Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on September 13 and November 1, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department Advocate called Marcel Hamer and Mary Bethea as witnesses and offered a video recording into evidence. Respondent called Detectives Jon Gladstone and Leonardo Pino as witnesses, testified on his own behalf, and offered a video recording into evidence. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, Respondent is found Guilty of Specification No. 1 and Not Guilty of Specification Nos. 2 and 3.

FINDINGS AND ANALYSIS

It is not disputed that a verbal and physical interaction took place between Respondent and Marcel Hamer on June 4, 2014, at about 1545 hours, in front of [REDACTED] Brooklyn, after Hamer was taken to the ground by Respondent. This interaction was recorded by witness Mary Bethea using her cell phone. An enhanced, clearer copy of the original video was admitted into evidence as Department's Exhibit 1. The original video, which is grainier than the

enhanced version but contains 15 seconds of additional footage, was admitted into evidence as Respondent's Exhibit A. Since these videos constitute the most reliable evidence as to what occurred after Hamer was taken to the ground by Respondent, the testimony presented at this trial can be summarized briefly.

Marcel Hamer, who is 19-years-old, testified that he and Mary Bethea and two male friends were smoking by passing each other a tobacco cigarette when he saw a man wearing civilian clothing jump out of a van and move rapidly toward them. Hamer asserted that because he did not know who this man was, he began running away. He was tackled to the ground. Respondent punched him on his face knocking him unconscious. Hamer recalled that at the point when Respondent punched him, a locked handcuff was on his right wrist but Respondent had not yet placed a handcuff on his left wrist. Hamer also confirmed that Respondent had asked him to give him his left hand but that he did not give Respondent his left hand because he was physically unable to at that point. Hamer agreed that the reason that Respondent had punched him was because Respondent believed that Hamer was resisting. Hamer was treated for an abrasion and swelling on the left side of his face at the Brooklyn Hospital Center (DX 2). At a pretrial interview, Hamer described what he and his friends had been smoking as a "cigar." Hamer confirmed that he pleaded guilty in Criminal Court to a charge of Disorderly Conduct.

Mary Bethea, who was [REDACTED] testified that she, Hamer and two male friends were passing around a tobacco cigarette. As she passed the cigarette to Hamer, a van stopped and a man jumped out and ran toward them. She and Hamer and their two male friends all ran because they believed that they were "being attacked." When she saw Hamer being tackled onto the ground by the man, she and the two male friends stopped running and walked over to them. She realized the man was a police officer when she "moved up close to

him" and saw his shield and his firearm on his side. She began recording with her cell phone. The officer's partner arrived and together they tried to handcuff Hamer "but they were getting so aggravated that we were a couple of feet behind" them. She saw the officer punch Hamer once on his face between his eye and his nose. She confirmed that the officer kept telling her and her friends "to move back and that's what we were doing." She estimated that about 15 people were watching but no one in the crowd touched the officer or threatened the officer as he was attempting to handcuff Hamer. She told the officer, "Mister, it was just a cigarette."

Respondent testified that he was on duty, dressed in plainclothes, assigned to a Narcotics Borough Brooklyn North team on June 4, 2014, when, at about 1545 hours, he observed Marcel Hamer and others passing around and smoking what appeared to Respondent to be a marijuana "blunt." When Respondent started to approach the men, Hamer ran. Respondent pursued Hamer, caught up to him, and pushed him down onto the ground. Because a person in the crowd was sneaking up behind him and moving close to him, Respondent, using a command voice, loudly ordered the person to back away. When the person did not immediately comply, he told him, "You want to get fucked up." Respondent handcuffed Hamer's left wrist and repeatedly ordered Hamer to give him his right arm. He attempted to get Hamer to turn his body so that he could handcuff Hamer's right wrist. When Hamer did not comply, Respondent ordered him to "Turn the fuck around," and when Hamer did not do so, he punched Hamer once on his face. He was then able to fully handcuff Hamer.

Detective Jon Gladstone testified that he was on duty on June 4, 2014, and that he was assigned as the escort officer to accompany Hamer in the ambulance that took him to a hospital. Hamer's eyes were closed and he was unresponsive. Gladstone testified that a smell of marijuana emanated from Hamer's lower leg area and that when he removed Hamer's sneaker,

Hamer "miraculously woke up" and told Gladstone not to search him. When Gladstone recovered a small bag of marijuana inside Hamer's sock, Hamer told him, "I was just smoking."

The video recordings in evidence and the testimony of Detective Leonardo Pino regarding the training that officers receive at the Police Academy concerning the proper use of force will be discussed in the Analysis section.

Analysis

Specification No. 1

Respondent is charged with using excessive force against Hamer by striking Hamer in the face. Respondent acknowledged that after he had pushed Hamer down onto the ground, and after he had placed a handcuff on Hamer's left wrist, he repeatedly ordered Hamer to give him his right arm and when Hamer did not comply, he punched Hamer once on his face in order to gain compliance.

The question presented is whether this punch to the face constituted excessive force under the specific circumstances presented here. I find that this question must be answered in the affirmative.

Patrol Guide Procedure No. 203-11 delineates the standards to be followed when the use of force is necessary to achieve legitimate police goals. It specifically requires that uniformed members of service (UMOS) "at the scene of an incident" use the "minimum force" needed because "excessive force will not be tolerated." Also, Detective Pino testified at this trial that at the Police Academy officers are taught to use the least amount of force necessary to gain control of a resisting suspect in order to handcuff the suspect; that if the officer has obtained control over a suspect, striking the suspect with a punch is not acceptable; and that when he viewed the videos he did not see any control issues for Respondent when Hamer was on the ground.

The enhanced video (DX 1) clearly shows that immediately prior to the point when Respondent threw the punch, Hamer was lying still on the pavement on his side; Respondent was holding Hamer's limp right arm; and Hamer's limp left arm was lying flat on the ground. Thus, the video establishes that Hamer was not engaging in any active aggression or active resistance to Respondent's effort to turn him completely over onto his stomach so that Respondent could rear handcuff him.

Finally, Respondent admitted during his testimony at this trial that Hamer had only passively resisted being handcuffed and that Hamer had not tried to kick, punch, or bite him and that Hamer was merely holding his right arm to the side of his body. Hamer confirmed that Respondent had asked him to give him his other hand. Although Hammer testified that he was physically unable to give Respondent his non-handcuffed hand, even if Hamer was willfully refusing to give him his hand, Hamer's noncompliance constituted only passive, not active, resistance to being fully handcuffed.

Thus, the evidence presented here differs from the evidence presented in a very recent case, *Case No. 2015-14479* (signed Dec. 8, 2016), where an officer was found not guilty of having used excessive force even though the officer admitted that he had punched a suspect once in the face. In that case, the Trial Commissioner credited the officer's claim that he only threw the punch in self-defense because he believed that the suspect was about to punch him. No video recording of the encounter was placed in evidence at that trial.

The evidence presented here is similar to the evidence presented in a recent case, *Case No. 2015-13090* (signed Oct. 25, 2016), where an officer was found guilty of having used excessive force by punching a suspect once in the head. In that case, as here, a video recording

of the encounter showed that at the point when the officer punched the suspect in the head the suspect was not actively resisting and his arms were limp.

In conclusion, since Hamer was not actively resisting Respondent's effort to place a handcuff on his non-handcuffed hand, I find that Respondent used excessive force against Hamer when he punched him in the face. Therefore, I find Respondent Guilty of Specification No. 1.

Specification No. 2

It is charged that Respondent spoke discourteously to Hamer by telling him, "Turn the fuck around." On the enhanced video (DX 1) Respondent is clearly heard telling Hamer, "Turn the fuck around." However, Hamer acknowledged that after Respondent had placed a handcuff on his right wrist and Respondent was trying to handcuff his left wrist, Respondent asked him to give him that hand and Hamer did not give him that hand. Most significantly, the video shows that at the point when Respondent uttered the order "Turn the fuck around," he was attempting to get Hamer to turn his body so that Respondent could place a handcuff on Hamer's wrist.

The use of profanity by an officer solely for the purpose of getting a suspect to comply with a lawful order issued during a stressful street arrest situation has been found not to constitute actionable misconduct. For example, in *Case No. 2005-80777*, an officer who uttered a remark containing the word "fuck" was found not guilty of discourtesy because the officer made this remark as he was attempting to effect the arrest of a suspect who was engaging in resistive behavior. Similarly, in a recent decision, *Case No. 2014-12673* (signed March 22, 2016), an officer who was charged with discourtesy because he had told a suspect to "get on the fucking ground" was found not guilty because the suspect had failed to comply with a previous non-profane order that he get down on his hands and knees. Therefore, I find Respondent Not Guilty of Specification No. 2.

Specification No. 3

Respondent is charged with threatening an unknown individual with the use of force without justification in that while he was attempting to handcuff Hamer he told the individual, "You want to get fucked up." Respondent is heard on the enhanced recording offered by the Advocate (DX 1) asking someone in the crowd, "You want to get fucked up?" The Advocate argued that Respondent's profane remark constituted an unnecessary threat to use force because Bethea testified that no one in the crowd had touched or threatened Respondent. Respondent testified that as he was attempting to handcuff Hamer, a person started sneaking up to him from behind him and that he told the person "Do you want to get fucked up," in a command tone as he was trained to do at the Police Academy, so that the person would clearly understand that if he tried to intervene in the arrest of Hamer there would be consequences.

Respondent's testimonial claim that he was concerned that a person who was present in the crowd was moving forward and was in uncomfortably close proximity to him, is supported by what Respondent is heard saying on the original video (RX A). Before he is heard saying to someone in the crowd, "You want to get fucked up," Respondent is heard loudly ordering, "Get away! Back away right now!" Bethea's testimony also supports Respondent's claim that he was concerned about how close a person in the crowd was to him. Bethea acknowledged that after Hamer was taken to the ground by Respondent, she "moved up close to" Respondent; that Hamer's two male friends joined her; that a crowd that Bethea estimated to be about 15 people gathered to watch; that Respondent and his partner "were getting so aggravated that we were a couple of feet behind" them; and that they "kept telling everyone to move back."

The use of profanity by an officer solely for the purpose of gaining control of people in a crowd has been found not to constitute actionable misconduct. For example, in *Case No. 2003-*

78667, an officer, who was assigned to keep people who were in an unruly crowd at a distance from a crime scene, who yelled, "Get the fuck back," had the discourtesy charge that had been brought against him dismissed. More recently, in *Case No. 2014-11644* (June 19, 2015), a sergeant was found not guilty of a charge that he had been discourteous to a prisoner who was yelling at the sergeant, because the sergeant had told the prisoner who was yelling "Shut up and mind your fucking business!" at a point when the sergeant and other officers were struggling to gain physical control of another prisoner.

Most recently, in *Case No. 2015-14617* (signed Dec. 19, 2016), a sergeant, who was attempting to arrest a suspect who was resisting being handcuffed, was charged with wrongfully threatening the suspect with the use of force by stating "Open your fucking hand before I crush you;" and with having spoken discourteously to the suspect by stating, "Shut the fuck up...you're a fucking idiot . . . why are you fighting the fucking cops idiot?" The sergeant was found not guilty of both charges because the Trial Commissioner found that the sergeant had uttered the "crush you" threat solely to get the suspect to cease resisting being handcuffed, and because although the "shut the fuck up" and "fucking idiot" remarks would constitute discourteous language had they been uttered during an ordinary encounter, since these profane remarks were made during a heated arrest situation, they did not constitute actionable misconduct.

Since on the original video (RX A) Respondent is heard loudly ordering someone in the crowd to, "Get away! Back away right now!" and since Bethea's testimony supports Respondent's claim that he was concerned about how close a person in the crowd was to him, consistent with the reasoning in the cited decisions, I find Respondent Not Guilty of Specification No. 3.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on March 1, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondent has a prior formal disciplinary adjudication (see attached Confidential Memorandum).

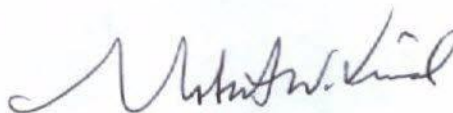
The Advocate recommended, at a pretrial conference, that Respondent forfeit 15 vacation days as a penalty.

Although Respondent has been found guilty only of using excessive force by punching Hamer in the face, penalties consisting of the loss of ten or 15 vacation days have consistently been imposed in cases where on duty UMOS have been found guilty of using excessive force by punching a suspect in the face. In *Case No. 2014-12821* (Feb. 18, 2016) an 18-year sergeant who had no prior formal disciplinary record forfeited ten vacation days for wrongfully punching an individual in the face and stepping on his head; and in *Case No. 2015-14727* (June 22, 2016), a seven-year officer with no prior disciplinary record forfeited a penalty of ten vacation days for punching a handcuffed prisoner in the face without police necessity. Also, in *Case No. 2015-13090* (Oct. 25, 2016), a five-year officer who had no prior disciplinary adjudications was found guilty of using excessive force by punching a suspect once in the face. Although the Trial Commissioner in that case recommended that the officer forfeit five vacation days as a penalty, the Police Commissioner imposed a penalty consisting of the forfeiture of ten vacation days. Finally, in *Case No. 2015-14073* (Dec. 19, 2016), a five-year officer who had no prior

disciplinary adjudications forfeited 15 vacation days after he was found guilty of unnecessarily punching a resisting suspect several times in the face.

Therefore, consistent with the penalties imposed in the cited decisions, and consistent with progressive discipline since Respondent has a recent prior disciplinary adjudication, it is recommended that Respondent forfeit 15 vacation days as a penalty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner Trials

APPROVED

MAY 23 2017



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE SEKOU BOURNE
TAX REGISTRY NO. 924971
DISCIPLINARY CASE NO. 2015-14379

Respondent received an overall rating of 4.0 on his 2014-2015 annual performance evaluation, 4.5 on his 2013-2014 evaluation, and 3.5 on his 2012-2013 evaluation. He has been awarded one Excellent Police Duty medal. [REDACTED]

He has a prior formal disciplinary record. In *Case No. 2014-11568* (signed Sept. 10, 2015), he forfeited five vacation days as a penalty after he was found guilty at trial of entering an apartment without sufficient legal authority, and frisking and searching a person inside the apartment without sufficient legal authority.

He has been placed on Level 1 Force Monitoring on two occasions. On September 2, 2013, he was placed on Level 2 Force Monitoring which is continuing.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner Trials